

TELEMARKETING

Telemarketing Sales

Overview

The Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) regulates unfair and deceptive business practices. DATCP rules regulate the telemarketing of consumer goods and services. These rules are found in Wisconsin Administrative Code chapter ATCP 127. Rule violators may be prosecuted, and there is a private remedy for consumers.

ATCP 127 does the following:

- Requires disclosures to consumers.
- Prohibits deceptive sales practices.
- Provides a 3-day right to cancel.
- Prohibits unauthorized withdrawal of funds from consumer accounts.
- Regulates prize offers.
- Prohibits calls to consumers who have asked seller not to call.
- Prohibits calls before 8AM or after 9 PM.

ATCP 127 applies to telemarketing solicitations aimed at Wisconsin consumers, regardless of where the calls originate. ATCP 127 regulates solicitations by telephone, video conferencing or other interactive voice communications. But ATCP 127 does **not** apply to any of the following (other laws may apply):

- Mass advertisements (such as television ads, radio ads or Internet home pages) that are not addressed to individual consumers or consumer residences.
- Telephone communications initiated by a consumer, unless prompted by the seller's prior telemarketing solicitation to the consumer.
- Persons who are not in the "business" of selling.
- Business-to-business sales.
 - Banks, savings and loan associations, credit unions, insurance companies, public utilities or telecommunications carriers whose activities are exempt under Wisconsin Statutes section 93.01(1m).
- Real estate sales, other than sales of cemetery lots and "time shares" as defined in Wisconsin Statutes section 707.02(24).

- Securities sold in compliance with Wisconsin Statutes chapter 551, or franchise investments sold in compliance with Wisconsin Statutes chapter 553.
- Pay-per-call services sold in compliance with Wisconsin Statutes section 196.208.

ATCP 127 is consistent with Federal Trade Commission telemarketing rules under 16 Code of Federal Regulations 310. **For more information about the Federal Trade Commission, click here: <http://www.ftc.gov>**

Opening Disclosures

Under ATCP 127, a telemarketer must disclose all the following to a consumer before asking any questions or making any statements other than an initial greeting:

- The name of the principal seller. For example, a telemarketing firm making solicitations on behalf of the ABC Company must disclose the name of the ABC Company.
- The name of the individual making the telephone solicitation. For example, if Mary Smith makes telephone solicitations for the ABC Company, she must disclose her name to the consumer. Smith may disclose a fictitious name that uniquely identifies her if the ABC Company keeps a record of that uniquely identifying fictitious name.
- That the seller is promoting the sale of goods or services.
- The kind of goods or services that the seller is promoting.

Disclosures Prior to Sale

A telemarketer must disclose all the following before the consumer enters into any purchase contract, and before the telemarketer takes the consumer's credit card number or accepts any payment from the consumer:

- The nature and quantity of the consumer goods or services included in the sale.
- The total cost to purchase and receive the consumer goods or services.
- All material terms and conditions affecting the sale, receipt or use of the consumer goods or services, including credit terms if any. Cost disclosures in consumer credit transactions must comply with federal law and Wisconsin Statutes chapter 422. **For more information about credit transactions, see Consumer Law topic, Money and Credit.**
- The name of the principal seller and at least one of the following:
 - The principal seller's mailing address.

- A local or toll-free telephone number, answered during normal business hours, at which the consumer may contact the principal seller and obtain the principal seller's address.
- The seller's policy related to refunds, cancellations, exchanges and repurchases if any of the following apply:
 - The seller has a policy that prevents or substantially limits refunds, cancellations, exchanges or repurchases.
 - The seller makes any claim or representation regarding refunds, cancellations, exchanges or repurchases.

A telemarketer may make these pre-sale disclosures orally (rather than in writing) if at least one of the following applies:

- The seller confirms the oral disclosures in writing at or before the time the seller first delivers the goods or services to the consumer, and before the seller submits any credit card sales draft for payment or accepts any other payment from the consumer.
- The seller does both of the following in writing at or before the time the seller first delivers consumer goods or services to the consumer:
 - Confirms the oral disclosures.
 - Discloses, in substance, that the consumer may cancel the sale after the first delivery and obtain a full refund. The seller may specify a cancellation deadline, provided that the deadline is at least 7 days after the first delivery.

Language Other Than English

If the primary language used in a telemarketing transaction is not English, the telemarketer must make the pre-sale disclosures in the language primarily used. Any written agreement signed by the consumer must be written both in English and the language primarily used.

Prize Promotions

A telemarketer may not violate the lottery law, Wisconsin Statutes section 945.02(3). Nor may the promoter violate the prize notice law, Wisconsin Statutes section 100.171. A telemarketer may not misrepresent the material terms of a prize promotion. **For more information on prizes and sweepstakes, see Consumer Law topic, Prizes and Sweepstakes.**

Unauthorized Payment

No telemarketer may obtain or submit for payment any check, draft or other negotiable instrument drawn on a consumer's account without that consumer's express, verifiable authorization. The following authorizations are considered verifiable:

- An express written authorization. Express written authorization may include the consumer's signature on the check, draft or negotiable instrument.
- An express oral authorization if all of the following apply:
 - The oral authorization is tape recorded and made available upon request to the consumer's bank.
 - The oral authorization clearly authorizes payment for the goods and services offered to the consumer.
 - The oral authorization clearly indicates that the consumer received information specifying all the following:
 - * The date and amount of the check, draft or instrument.
 - * The payor's name.
 - * The number of payments, if more than one.
 - * A telephone number for consumer inquiries that is answered during normal business hours.
 - * The date of the consumer's oral authorization.
- An authorization that the seller confirms in writing, provided that all the following apply:
 - The seller sends the written confirmation to the consumer before submitting the check, draft or other negotiable instrument for payment.
 - The written confirmation includes all the following information:
 - * The date and amount of the check, draft or instrument.
 - * The payor's name.
 - * The number of payments, if more than one.
 - * A telephone number for consumer inquiries that is answered during normal business hours.
 - * The date of the consumer's authorization.
 - * A procedure by which the consumer can obtain a refund from the seller if the written confirmation is inaccurate.

Credit Card Laundering

ATCP 127 prohibits "credit card laundering" related to telemarketing transactions. In "credit card laundering" schemes, unscrupulous sellers gain access to the credit card system (from which they would normally be excluded) by processing credit card transactions under the name of another merchant.

A merchant may not present for payment, to a credit card system, any credit card sales draft generated by a telemarketing transaction that is not a sale by that merchant to that credit card holder. No seller may obtain access to a credit card system under the name of another merchant unless that access is authorized by that merchant's written agreement with the credit card system operator, or with an acquirer licensed by the credit card system operator.

Misrepresentations

A telemarketer may not do any of the following:

- Misrepresent the seller's identity, affiliation, location or characteristics.
- Misrepresent the nature, purpose or intended length of a solicitation.
- Misrepresent the nature or terms of a telemarketing transaction, or any document related to that transaction.
- Misrepresent the cost of goods or services offered or promoted by the seller, or fail to disclose material costs payable by the consumer.
- Misrepresent the nature, quantity, material characteristics, performance or efficacy of the goods or services offered or promoted by the seller.
- Misrepresent or fail to disclose material restrictions, limitations or conditions on the purchase, receipt, use or return of goods or services offered or promoted by the seller.
- Misrepresent the material terms of the seller's refund, cancellation, exchange, repurchase or warranty policies.
- Misrepresent that the seller is offering consumer goods or services free of charge or at a reduced price.
- Misrepresent that the seller is affiliated with, or endorsed by, any government or 3rd-party organization.
- Misrepresent that the seller has specially selected the consumer, or is making a special offer to the consumer.
- Represent that the seller is participating in a contest or conducting a survey unless the representation is true and all the following apply:
 - The seller first makes all of the opening disclosures required by this rule.
 - The seller discloses the name of the contest or survey sponsor, and the specific terms of the contest or survey.
 - The seller discloses that the seller is attempting to sell goods or services, or to identify sales prospects, if that is the case.

- Misrepresent any material aspect of an investment opportunity, including risk, liquidity, earnings potential or profitability.
- Fail to disclose, in connection with every purported offer of free goods or services, any costs that the consumer must incur and any conditions that the consumer must meet in order to receive those free goods or services.
- Make any false, deceptive or misleading representation to a consumer.

Prohibited Practices

A telemarketer may not do any of the following:

- Threaten, intimidate or harass a consumer.
- Repeatedly or continuously cause a consumer's telephone to ring, or repeatedly or continuously engage a consumer in telephone conversation, with intent to annoy, abuse or harass a consumer.
- Initiate a telephone solicitation to a consumer before 8:00 AM or after 9:00 PM without the prior consent of the consumer.
- Make a telephone solicitation to a consumer who has previously stated that he or she does not wish to receive telephone solicitations from that seller.
- Request or receive payment for "loan finder" services until the consumer actually receives the promised loan.
- Fail to give or honor a 3-day right to cancel notice, if required under Wisconsin Statutes section 423.203.

Recordkeeping

A seller must keep copies of the following records for at least 2 years:

- All telemarketing scripts, and all sales and promotional materials used in telemarketing transactions.
- The following records related to each prize that the seller offers or awards to consumers if the seller represents, to any consumer, that the prize has a value of \$25 or more:
 - An identification of the prize.
 - The name and last known address of every consumer who received the prize.

- The name and last known address of every consumer who purchased goods or services in a telemarketing transaction, the purchase date, the date on which the seller provided those goods or services to the consumer, and the amount paid.
- The following information related to every individual who has made telephone solicitations for the seller:
 - The individual's name, last known address and telephone number.
 - Every fictitious name which the individual has used when making telephone solicitations. No other individual may use the same fictitious name.
 - The individual's job title or titles.
- Verifiable authorizations for all checks, drafts or other negotiable instruments drawn on a consumer's account.

Rule Background

ATCP 127 is a general order (rule) adopted under Wisconsin's Unfair Business Practices Law, Wisconsin Statutes section 100.20.

- DATCP adopted a prior version of ATCP 127 in 1972 (DATCP Docket No.1004.)
- DATCP amended ATCP 127 in 1972 (Docket No. 1034) and in 1976 (Docket No. 1202).
- DATCP completely repealed and recreated ATCP 127 in 1999 (DATCP Docket No. 97-R-8)

Rule Enforcement

Private Remedy

A person who suffers a monetary loss because of a seller's violation of ATCP 127 may sue the seller under Wisconsin Statutes section 100.20(5), and may recover twice the amount of the loss, together with costs and attorneys fees.

Injunction and Restitution

DATCP may seek a court order under Wisconsin Statutes section 100.20(6), enjoining violations of ATCP 127 and ordering a seller to pay restitution to consumers. The Department of Justice or a district attorney may represent DATCP in court.

Civil Forfeiture

DATCP or any district attorney may start a court action under Wisconsin Statutes section 100.26(6) to recover a civil forfeiture from a seller who violates ATCP 127. The court may impose a civil forfeiture of up to \$10,000 per violation. The Department of Justice or a district attorney may represent DATCP in court.

Criminal

A district attorney may start a criminal prosecution, under Wisconsin Statutes section 100.26(3), against a seller who violates ATP 127. A violator may be fined up to \$5,000 or sentenced to as much as a year in jail, or both.